

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LAWRENCE F. AND SHARON BAUER</b>	:	DETERMINATION
	:	DTA NO. 818492
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1992, 1993 and 1994.	:	

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Petitioners, Lawrence F. and Sharon Bauer, 4425 Waters Edge Lane, Sanibel, Florida 33957, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1992, 1993 and 1994.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on February 27, 2002 at 10:45 A.M., with all briefs to be submitted by July 19, 2002, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Beilis and Pols, P.C. (Donald Jay Pols, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation correctly held petitioners subject to New York State personal income tax as resident individuals pursuant to Tax Law § 605(b)(1)(A) or (B) for any or all of the years 1992, 1993 or 1994.

II. Whether, assuming petitioners were subject to tax as residents of New York State either on the basis of domicile or “statutory” resident status, penalties imposed by the Division should nonetheless be abated.

***FINDINGS OF FACT***

1. On May 11, 2000, the Division of Taxation (“Division”) issued to petitioners, Lawrence F. Bauer and Sharon Bauer, a Notice of Deficiency asserting additional personal income tax due for the years 1992, 1993 and 1994 in the aggregate amount of \$97,569.66, plus penalty and interest. This notice was premised on the assertion that petitioners were taxable as residents of the State of New York for each of such years. The penalties asserted were those for failure to file a tax return, negligence, and substantial understatement of income tax liability, pursuant to Tax Law § 685(a), (b) and (p), respectively.

2. The foregoing notice was issued as the result of audit activities undertaken by the Division for the years in issue, and followed an earlier audit encompassing the immediately preceding years (1989 through 1991), which involved the same issue, to wit, whether petitioners were properly subject to tax as residents of the State of New York. The earlier audit was settled between the parties.

3. Petitioners challenged the Division’s Notice of Deficiency by requesting a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services. A conciliation conference was held on December 13, 2000 and, by a subsequent Conciliation Order (CMS No. 182147) dated February 9, 2001, the Notice of Determination was sustained in full. Petitioners continued their challenge by filing a petition with the Division of Tax Appeals.

4. Lawrence F. Bauer and Sharon Bauer were residents of New York State, at least until the years immediately preceding those in issue.<sup>1</sup> Lawrence F. Bauer became a licensed customhouse broker on May 15, 1970 and at about the same time, formed Columbia Shipping Company (“Columbia”), an entity engaged in business as an importer and customhouse brokerage firm. As a licensed customhouse broker, Mr. Bauer (and Columbia) was involved in the classification, for customs purposes, of various items of merchandise being brought into the United States. Customhouse brokers, including firms such as Columbia, are typically hired by importers to handle the necessary paperwork involved in bringing goods into the United States. Columbia was successful, and grew from one licensed broker (Mr. Bauer) to some 40 employees including other licensed brokers. Mr. Bauer was, and apparently is, Columbia’s majority shareholder and owner. A January 1994 filing with the U.S. Customs Service includes an attached listing of the Columbia Shipping Companies as follows:

<u>Company Name</u>	<u>Ownership</u>
Columbia Shipping, Inc. (New York) 138-01 Springfield Blvd. Jamaica, New York 11413	90% Lawrence Bauer 10% Michael McAdams
Columbia Shipping, Inc. (Chicago) 2801-03 Coyle Avenue Elk Grove, Il. 60007	66 2/3% Lawrence Bauer 33 1/3% Dan Morrell
Freight Express International, Inc. 138-01 Springfield Blvd. Jamaica, New York 11413	65% Lawrence Bauer 35% Vincent DeRossa (bought out by Bauer in 1990)

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<sup>1</sup> Petitioner Lawrence F. Bauer testified to this fact. While petitioner Sharon Bauer did not appear or provide testimony, there is no argument that she was not a lifelong resident of New York State. As noted, petitioners were audited for the three-year period spanning 1989 through 1991, i.e., the years preceding those in issue. The outcome of that audit was ultimately a settlement reached between the parties whereunder petitioners paid a reduced amount of the asserted deficiency and did not contest the Division’s assertion that they were taxable as residents for the three-year period in issue.

Columbia Shipping (West) Los Angeles, California	65% Lawrence Bauer 30% Ron McDonald 5% Guy Nashida
Columbia Shipping (SFO) San Francisco, California (a division of CS, West until 1990; a separate corporation until 1993; then a division of New York)	60% Lawrence Bauer 40% Various individuals
Columbia Shipping (Houston) Houston, Texas	50% Lawrence Bauer 50% Various individuals

5. In 1975, petitioners purchased a home on Oyster Bay Road at 2160 Titus Path, Muttontown, New York. This home was an expanded ranch built in 1955, and included four bedrooms, three bathrooms, a living room, dining room, kitchen, family room and greenhouse. The house, a man-made pond, and a five-stall barn, described as a horse farm, was situated on 4.93 acres, including three acres of grass pasture.

6. Mr. Bauer retired from active involvement in Columbia's day-to-day business in 1987. Thereafter, he did some "consulting" work for Colombia Shipping, but mostly "enjoyed himself." Petitioners had visited and vacationed in Florida on many occasions over the years and, in 1987, purchased a three-bedroom, two-bathroom condominium located on Marco Island at 720 South Collier Avenue. To furnish this condominium, petitioners purchased from a local (i.e., Florida) store a "condominium package" designed to outfit a complete condominium. Mr. Bauer noted that the furniture in their Muttontown residence was not compatible in style with their condominium in Florida. Lawrence F. Bauer obtained a Florida driver's license dated November 24, 1987, registered to vote in Florida on November 30, 1987, and on November 30, 1987 filed a Florida Declaration of Domicile stating that Florida was his domicile as of November 24,

1987. The record does not reveal whether or when Mrs. Bauer executed and filed similar documents.

7. In 1988, petitioners moved certain items from their Muttontown residence to their condominium, including some photos, an antique desk, some gift items, and collectible items including a mounted sailfish and collectible carved horses.

8. In 1991, petitioners purchased a three-bedroom, two-bathroom house located at 1834 Wood Ring Road, Sanibel Island, Florida. Petitioners moved their belongings from their condominium to this house. In May 1991, petitioners purchased new bedroom and living room sets of furniture for this house.

9. In 1994, petitioners purchased a three-bedroom house located at 4425 Waters Edge Lane, Sanibel Island, Florida. Petitioners moved their belongings from their Wood Ring Road house to the new house at Waters Edge Lane.

10. Petitioners' general pattern of living was to spend the colder months in Florida and the warmer months in the Northeast. The time spent in the Northeast appears to have centered around New York, although some of the time was spent cruising in their boat to different ports along the Northeast coast, including Newport, Rhode Island, Nantucket, Martha's Vineyard, and various ports in Connecticut and Maine. According to the boat log submitted in evidence, petitioners generally sailed the boat from Florida to New York in late April or early May, and sailed the boat back to Florida in or about mid-October each year. Review of petitioners' day count reveals that petitioners did not stay in Florida from October through May, but rather spent considerable time elsewhere, including New York.

11. Over the years petitioners have owned several boats. For some years prior to 1993, petitioners owned a 53-foot Hatteras Sport Fisherman. In May 1993, petitioners traded this boat for a 66-foot Burger Motor Yacht named the *Golden Eagle*. Petitioners were members of the Huntington Yacht Club in Huntington, New York, and maintained such membership during the years at issue. They moored their boat there during the summer months. During the winter months, they moored their boat at the Gulf Harbor Marina in Florida. Petitioners did not belong to golf clubs or other social clubs. Lawrence Bauer alluded to performing volunteer work at church in Florida, but no further specifics were provided.

12. Petitioners' boats had full living facilities, including a kitchen, bedrooms and the like. Petitioners lived on the boats, including some of the time when their boat was moored at the Huntington Yacht Club. According to Lawrence Bauer, petitioners spent "not much" time living at the Muttontown house. Specifically, he stated that petitioners did not use the Muttontown house in 1991 and part of 1992, because their son was living there, and used the house "a little bit" in 1993, but noted that they had also listed the house for sale during 1993. They did not use the house at all in 1994.

13. Petitioners have two children, a son and a daughter. In or about 1991, petitioners purchased two homes in Huntington, Long Island, New York, located at 25 Lorraine Court and 29 Edgar Court, respectively. In 1995, petitioners sold the 25 Lorraine Court home to their daughter and son-in-law, and sold or gave the 29 Edgar Court home to their son and daughter-in-law. Petitioners never lived in either of these homes.

14. Petitioners had several pets, including dogs, cats, birds, lizards and horses. Except for the horses, the record does not specify whether the pets were transported back and forth between Florida and the Northeast as opposed to remaining in Florida and being cared for there. Petitioners believed the climate in Florida was not healthy for the horses, and petitioners attempted to find suitable housing for them in New York and elsewhere. The horses remained in New York for some period of time, were moved to and housed in Virginia thereafter, and eventually were moved to Florida. The dates of such interim move to Virginia and ultimate move to Florida were not specified in the record.

15. Petitioners listed their Muttontown house for sale in 1993. By a letter to one Barbara Catalano, a licensed realtor, dated January 17, 1993, petitioners stated the following with regard to their Muttontown property:

After Sharon and I discussed the various proposals you offered us we have decided not to list our house with you using the Multiple Listing Service MLS. We are however very much interested in selling our house. It is and has been vacant for a while and we realize that even though we have someone taking care of things it is not good for a house to sit vacant.

We will give you an exclusive to sell our house but only you. We don't want a bunch of real estate brokers traipsing through the house and we don't want it widely known that the house is vacant.

As per our conversation we give you the exclusive right to act as our agent for the sale of our house at 2160 Titus Path, Muttontown, NY.<sup>2</sup>

16. Petitioners ultimately sold the Muttontown house on August 23, 1996. The house remained fully furnished and habitable throughout the period in issue and thereafter until its sale

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<sup>2</sup> Lawrence Bauer testified to an earlier (1991) verbal listing with the same broker. This earlier agreement was "taken back," because petitioners' son was living in the Muttontown house at such time and was experiencing ongoing and increasing difficulties with epileptic seizures.

in 1996. The purchasers did not want the furnishings in the house and, upon sale, some furnishings (an oriental rug, bedroom furniture, and the like) were given away to friends. The remaining items were simply cleared out for the new owners. With only a few exceptions, clothing items were not moved to Florida since they would not be appropriate for the Florida climate. Those items moved to Florida as described above (*see* Finding of Fact “7”), as well as certain items moved by petitioners via boat on subsequent trips, were antiques, artifacts and items petitioners “considered important.”

17. Although Lawrence Bauer had retired from the customs business, he continued to keep his license as a customhouse broker in force. When petitioner first obtained his license and for several years thereafter, there was no requirement to renew or update the status of such license. In the late 1970s or early 1980s, a triennial status updating requirement was instituted. From such time forward, Columbia Shipping filed the required status update notification on behalf of its licensed brokers, including petitioner, and paid the required \$100.00 fee.

18. The record includes a U.S. Customs Service receipt issued to Columbia Shipping, Inc. dated January 24, 1994, listing the triennial status report filing for seven licensed brokers, including Lawrence F. Bauer, and reflecting the payment of \$700.00 in total. The record also includes a letter under the letterhead and signature of Lawrence F. Bauer, Rfd 2160 Titus Path, Muttontown, New York, dated January 19, 1994, to the Regional Commissioner of Customs, stating as follows:

In accordance with the provisions of 19 USC 1641(g)(2), this is to inform you that the undersigned is a Licensed Customhouse Broker holding individual license No. 4274 issued on 5.15.70 to transact business in the Customs District of New York City.

I am actively engaged in transacting Customs business as an employee of:

Columbia Shipping Inc.



138-01 Springfield Blvd.  
Jamaica, NY 11413

Corporate License No. 4416  
Dated April 23, 1971  
District: New York City

This firm has no branch office(s) in this district.

19. The record contains no specific explanation concerning the foregoing letter or differentiating the same from the earlier described filing evidenced by the Customs Service receipt to Columbia Shipping. The record also includes an unsigned letter under the letterhead of Lawrence F. & Sharon Bauer, 425 Water's Edge Lane, Sanibel Island, Florida 33957, dated November 10, 1994. This letter is headed "Change of Address Notice," and lists the "Old Address" as petitioners' Muttontown, New York address, and the "New Address" as the 4425 Water's Edge Lane, Florida address.

20. The record includes a second U.S. Customs Service receipt, dated February 19, 1997, issued to Columbia evidencing its filing of the triennial report and payment of the requisite fee on behalf of five licensed brokers, including petitioner Lawrence Bauer. This receipt is accompanied by an individual Customs Broker Triennial Status Report for February 1997 for Lawrence F. Bauer, listing his address as 4425 Waters Edge Lane, Sanibel, Florida. This report lists Mr. Bauer as actively engaged in conducting Customs business and as a corporate officer of Columbia Shipping, Inc.

21. As part of its audit, the Division also requested information and substantiation concerning petitioners' whereabouts on each of the days during the audit period for purposes of determining the number of days when petitioners were present in New York. Petitioners prepared and submitted a "day count" listing each day and petitioners' claimed whereabouts on

each such day. There is no distinction on such day count between petitioner Lawrence F. Bauer's whereabouts as opposed to petitioner Sharon Bauer's whereabouts on any given day. It appears that substantiating documentation, though requested by the Division's auditor, was not provided to the auditor by petitioner's former representative, notwithstanding that at least some of such documentation was provided by petitioners to their former representative.

22. Petitioners' day count was based on American Express, VISA and Discover charge receipts, a "Radar Log" or boat log maintained by Lawrence Bauer when he was sailing, and a personal diary for Lawrence Bauer for the year 1992 containing entries for some though not all of the days of such year.

23. Petitioners' day count listed certain days as "block days." These days were those sandwiched between two dates in a particular location, such that the interim or "sandwiched days" were considered days spent in the same location. Petitioners' day count resulted in the following distribution of days within and without New York:

<u>YEAR</u>	<u>DAYS IN N.Y.</u>	<u>DAYS OUTSIDE N.Y.</u>	<u>DAYS IN FLORIDA</u>
1992	163	203	85
1993	153	212	125
1994	112	253	192

24. The Division initially challenged petitioners' day count for each of the three years at issue. However, by its post-hearing brief, the Division eliminated its challenge to petitioners' day count for the year 1994, and withdrew its assertion that petitioners were taxable as "statutory residents" of New York (per Tax Law § 605[a][1][B]) for such year. Nonetheless, the Division continues its challenge for the years 1992 and 1993, specifically disputing 28 claimed out-of-state days for 1992, and 40 claimed out-of-state days for 1993. The Division maintains that

petitioners have not established their presence outside of New York on such disputed days, leaving them present in New York on 191 days in 1992 and 193 days in 1993 and thus properly subject to tax as “statutory” residents. The specific days challenged by the Division for each of the years 1992 and 1993 are as follows:

<u>1992</u>	<u>1993</u>
January ----	January ----
February ----	February 13, 14, 26 - 28
March ----	March 1, 5 - 7, 26 - 28
April 4 - 11	April 30
May 16 - 18, 23 - 31	May 13 - 17, 19 - 27, 29 - 31
June 1 - 2	June 1 - 4, 7 - 8, 11
July 2	July 16
August ----	August ----
September ----	September 30
October 18	October 1
November 11 - 12	November ----
December 29-31	December ----

25. Petitioner Sharon Bauer was not present at the hearing in this matter and did not provide testimony regarding her whereabouts on any given day. In 1994, Mrs. Bauer did file a New York nonresident income tax return for tax year 1992. The nature and source of the income reported thereon is not specified. However, there is no dispute that the tax due on such income was paid. Petitioner Lawrence Bauer did not file a New York State income tax return for 1992. Petitioners did not file New York State income tax returns for the years 1993 or 1994.

26. Attached to petitioners’ brief was an affidavit made by Lawrence Bauer together with nine photocopies of guest checks allegedly from the Huntington Yacht Club. This submission alleges that certain of the purchases in New York on disputed dates were made by others, specifically petitioners’ children. The photocopies of the guest checks are of poor quality and bear no logo or other indication identifying the Huntington Yacht Club. Only two of these guest checks are dated in a manner showing the year (those for 2/28/92 and 3/6/93), while the balance

of the guest checks are dated only as to day and month. The date 2/28/92 is not one of the disputed dates at issue in this matter. No specific provision was made for the submission of evidence post-hearing. Accordingly, the documents attached to petitioners' post-hearing brief were not considered in reaching the conclusions in this determination.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (1) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State source income, whereas residents are taxed on their income from all sources.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State, and both are at issue in this proceeding. The first, or domicile basis for resident status, is specified under Tax Law § 605(b)(1)(A), and turns largely on the concept of an individual's "home." The second, or "statutory" resident basis, is specified under Tax Law § 605(b)(1)(B), with the dual predicates for resident tax status being (1) the maintenance of a permanent place of abode in the State and (2) physical presence in the State on more than 183 days during a given taxable year.

C. Treated first is the issue of whether petitioners were domiciliaries of New York State. The Tax Law does not contain a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (*see*, 20 NYCRR 105.20[d]). As relevant, it provides as follows:

*Domicile.* (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation in some other place.

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(4) A person can have only one domicile. *If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home.* In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere. (Emphasis supplied.)

D. Under the case law, a person may have many residences, but has only one domicile and "home." It is well established that an existing domicile continues until a new one is acquired, and the burden of proof to show a change in domicile rests upon the party alleging the change (*see, Matter of Newcomb's Estate*, 192 NY 238). To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile

and to acquire another (*Matter of Minsky v. Tully*, 78 AD2d 955, 433 NYS2d 276). Both the requisite intent as well as the actual residence at the new location must be present (*id*). The concept of intent was addressed by the Court of Appeals in *Matter of Newcomb's Estate, supra.*, as follows:

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The *animus manendi* must be actual with no *animo revertendi*. . . .

This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice.

D. The test of intent with respect to a purported new domicile has been stated as “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138, 140, *citing Matter of Bourne*, 181 Misc 238, 246, 41 NYS2d 336, 343; *affd* 267 App Div 876, 47 NYS2d 134). A taxpayer may change his or her domicile without severing all ties with New York State (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990). However, moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (*Matter of Zinn v. Tully*, 54 NY2d 713, 442 NYS2d 990). Only when coupled with the clear intent to change one's domicile does the fact of a changed residence become a true change of domicile. While certain declarations may evidence a change of domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (*see, Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989; *citing Matter of Trowbridge*, 266 NY 283, 289).

E. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740 *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989); (2) continued business activity in New York (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) family ties in New York (*Matter of Gray, supra*; *Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205

AD2d 852, 613 NYS2d 294); (4) continuing social and community ties in New York (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Trowbridge*, 266 NY 283, 289; *Matter of Gray, supra*; *Matter of Getz, supra*).

F. In the present matter, petitioner Lawrence Bauer obtained a Florida driver's license, registered to vote in Florida, and filed a Declaration of Domicile. As noted, in reviewing the acts of a taxpayer alleging a change in domicile, formal declarations have been held to be "less persuasive than the informal acts of an individual's general habit of life" (*Matter of Silverman, supra, citing Matter of Trowbridge, supra*). Ultimately, there is no clear indication in the record that petitioners intended to sever their New York ties, or that they possessed the requisite intent to make Florida their fixed and permanent home. In fact, the record contains no evidence to show any strong affinity on petitioners' part for making the focus of their life, i.e., their home, in Florida as opposed to New York. Their children resided in New York. Petitioners retained their home in Muttontown, New York throughout the years in issue, notwithstanding that they used it only occasionally. There is no clear showing of a break from New York until petitioners sold or gave homes to their children and, ultimately, sold the Muttontown home. It is also noteworthy that during the first two years in issue, petitioners spent far more time in New York than in Florida. That is, petitioners spent, at a minimum by their own admission, 163 days in New York during 1992 and 153 days in New York in 1993. Of the remaining 203 days in 1992 and 212 days in 1993, only 85 days and 125 days, respectively, were spent in Florida, petitioners' claimed place of domicile. Such a distribution of time gives no sense of affinity for Florida, as opposed to New York, as petitioners' "home." This trend changes in 1994, with petitioners spending 112 days in New York and 192 of the remaining 253 days in Florida. However, there is no compelling sense from the record that petitioners considered Florida to be their home at this



point in time. Finally, it is significant that the record provides essentially no specifics from which Mrs. Bauer's intent with regard to domicile may be discerned.

G. While one could clearly conclude that petitioners were no longer domiciled in New York upon the sale of their Muttontown home in 1996, the record is not so clear at any earlier point in time. There is no event or series of events which clearly delineate a point in time during the years in issue when petitioners' focus of "home" was in Florida. The testimony in this regard is not particularly compelling, nor does the balance of the evidence show a focus on Florida. In fact, the sense that emerges is just the opposite, and notwithstanding Mr. Bauer's claim to the contrary, the pattern is that petitioners wintered in Florida and came back to New York for the summers. At best, it appears that petitioners' change of domicile was a process in motion during the years in issue.<sup>3</sup> It appears petitioners were in many regards "hanging on" to New York. Petitioners maintained continuing significant ties to the Northeast and most specifically to New York. In summary, petitioners' declaration of a Florida domicile and other formal acts are undermined by their general habit of life in which New York appears to have remained their permanent focus and sense of home. The continued maintenance of the Muttontown home, the large amount of time spent in New York during the years in issue, and the lack of any clear or apparent affinity for Florida as opposed to New York, save for the assumed lure of a more temperate winter climate, all serve to negate an intent to give up their New York domicile or to acquire a new domicile in Florida. Accordingly, it must be found that petitioners continued to be

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<sup>3</sup> Much has been made of the impact of Mr. Bauer's triennial registration as a licensed customhouse broker, including the fact that a change of address notice listing the Florida address was not given until November 1994. Ultimately, the triennial registration act appears to have been a ministerial act carried out by Columbia Shipping on behalf of all of its licensed brokers, including Mr. Bauer. It has been accorded minimal weight as a factor indicative of petitioners' domicile.

domiciled in New York during the years 1992, 1993 and 1994, and thus were properly subject to tax as residents of New York.

H. Having concluded that petitioners were New York domiciliaries and thus subject to tax as residents for the years in issue alone supports sustaining the Notice of Deficiency. However, in the interest of completeness, the issue of “statutory” resident status as raised will also be addressed. Regulations of the Commissioner of Taxation provide, at 20 NYCRR 105.20(a)(2), that the term “resident individual” includes:

[a]ny individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

I. In addressing the issue of what constitutes a permanent place of abode, 20 NYCRR 105.20(e)(1) goes on to provide, in part as follows:

[a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse. However, a mere camp or cottage, which is suitable and used only for vacation, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.

J. There is no dispute that the Muttontown home was a permanent place of abode maintained by petitioners. Therefore, the only remaining question is whether petitioners were present in New York on more than 183 days in either or both of the years 1992 and 1993. In this regard, 20 NYCRR 105.20(c), prescribes rules for determining days spent within and without New York State for purposes of resident status, as follows:

In counting the number of days spent within and without New York State, presence within New York State for any part of the calendar day constitutes a day spent within New York State, except that such presence within New York may be

disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the [Division of Taxation] adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York State.

K. Based on its review of petitioners' schedule of days, the Division specifically identified and rejected some 28 days in 1992 and some 40 days in 1993 claimed by petitioners as non-New York days. These days are identified in Finding of Fact "24". In reviewing the documentary evidence and the testimony in this case for purposes of determining whether petitioners established their claim that they were not in New York on some or all of the disputed days, a number of factors were considered. First, for some of the disputed days, there are simply no written records in evidence from which petitioners' whereabouts could be ascertained. While Mr. Bauer did produce a diary, it was only for the year 1992. The entries therein were not daily entries but rather were most often separated by blank days and may best be described as cryptic in nature, as opposed to detailed or descriptive. In fact there are no entries in the diary detailing petitioners' whereabouts on any of the disputed days. Petitioner Lawrence Bauer appears to have traveled frequently and to many different places throughout the years in issue, and the evidence tendered, including credit card charge statements, reflects such travel. Lawrence Bauer testified in general concerning his whereabouts and pattern of living during the subject years, and his testimony was given in an honest manner. At the same time, unfortunately, it is largely nonspecific, and does not establish where he might have been on each and every particular day of the years in issue including, most specifically, the challenged days. Furthermore, there is no testimony offered by or concerning Mrs. Bauer's whereabouts on any specific days including, most specifically, the challenged days. Nor do the credit card billing statements establish either

petitioners' whereabouts with certainty.<sup>4</sup> In this regard, there are instances of charges in and out of New York on the same dates.<sup>5</sup> These discrepancies, as well as the multiple charges in different locales, could be attributable to mail order purchases on the same dates as in-person purchases, or to purchases made by some authorized card users other than petitioners, such as their children. The instances of charges in more than one jurisdiction could also indicate dates on which one of the petitioners was in New York while the other was not, including instances where one was sailing and the other was not. Unfortunately, the record does not explain these circumstances. These discrepancies at the least undermine the reliability of the credit card charges as verifying petitioners' presence in a specific location on any particular day and, ultimately, cast doubt on the accuracy of the day count as presented. Absent some specific testimonial recall establishing petitioners' use of a credit card to make a particular purchase, the mere existence of a charge on a particular day (notwithstanding that the charge was ultimately paid for by petitioners) does not establish that petitioners personally made the charge or were present at the location where the charge was made, nor does the absence of a charge on a given day conclusively establish that one or both of the petitioners was not in New York.

L. Petitioners' arguments incorrectly attempt in large measure to place the burden of establishing petitioners' presence in New York upon the Division. The fact that the Division has challenged petitioners' day count, in general and with respect to the particularly identified

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<sup>4</sup> For example, an American Express bill shows lodging charges at the Sundial Ranch and Tennis Club in Sanibel, Florida from 3/2/92 through 4/14/92, yet petitioner's own schedule admits petitioners' presence in New York on 4/12/92 through 4/14/92.

<sup>5</sup> For example, there is an AMEX charge at the Rusty Scupper in Connecticut on 10/18/92 and a Discover Card charge at Sears in Hicksville, NY on the same date. Similarly, there is a charge at the Hicksville Pamper in Hicksville, NY on June 3, 1993 and a charge at the Boat Owner's Warehouse, Ft. Lauderdale, Florida on the same date. In addition, there is a charge at Candlewycke Antiques in Cold Spring Harbor, NY and at the Syosset Animal Hospital in Syosset, NY on 6/7/93 but also a charge at Port Charlie's Restaurant, Southport, North Carolina on the same date. A listing of the credit card charges at New York vendors on the disputed dates when petitioners claim to have been outside of New York is included as Appendix A of this determination.

disputed days in 1992 and 1993, does not alter the burden of proof. Ultimately, it is petitioners' burden to establish their whereabouts in locales outside of New York on more than the requisite number of days in order to prevail on the issue of statutory residence. The evidence in the record fails to clearly establish petitioners' whereabouts on the disputed days and thus does not meet petitioners' burden. After repeated careful review of the evidence (documents and testimony) presented and applying the reasoning and considerations set forth above, including consideration of petitioner's whereabouts on days preceding and following the disputed days or periods where relevant, it is concluded that petitioners have not met their burden of establishing that they were not present in New York on any of the 28 disputed days in 1992 or any of the 40 disputed days in 1993. In turn, adding such days to those days on which petitioners were admittedly in New York in such years, results in petitioners' being present in New York on more than 183 days in each of the years 1992 and 1993. Accordingly, petitioners were properly subject to tax as "statutory" residents of New York in each of such years.

M. Petitioners have not established such basis as rises to the level of reasonable cause or substantial authority supporting abatement of the penalties properly imposed in this matter. The record conveys no real sense of petitioners' affinity for Florida over New York such that one would clearly conclude that petitioners actually considered Florida to be their home during the years in issue. This undermines the claim that petitioners believed they had changed their domicile and home from New York to Florida and, as a result, were not subject to tax as New York State residents.

N. The petition of Lawrence F. and Sharon Bauer is hereby denied and the Division's Notice of Deficiency dated May 11, 2000 is sustained.

DATED: Troy, New York  
January 2, 2003

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

***APPENDIX A***  
**1992**

For 1992, there are no credit card charges shown on any of the disputed dates except for July 2, which shows a Discover Card charge at the Sears store in Hicksville, New York..

<u>CHALLENGED DATE</u>	<u>CREDIT CARD</u>	<u>NEW YORK CHARGE</u>
2/13	-----	-----
2/14	-----	-----
2/26	-----	-----
2/27	-----	-----
2/28	-----	-----
3/01	-----	-----
3/05	-----	-----
3/06	-----	-----
3/07	-----	-----
3/26	AMEX	Cow Harbor Inn, Northport, NY
3/27	-----	-----
3/28	AT&T	Syosset Drugs, Syosset, NY
4/30	AMEX	Ben's Deli, Jericho, NY
5/13	AMEX	IHOP, Norwich, NY
5/14	AMEX	La Pizzetta, Hicksville, NY
5/14	ATT	Hicksville Pamper, Hicksville, NY
5/14	ATT	Petco, Hicksville, NY
5/15	AMEX	Buckram Stables, Locust Valley, NY
5/16	AMEX	Ben's Deli, Greenvale, NY
5/17	AMEX	Nina's Restaurant, Huntington, NY
5/19	ATT	Genovese's, Huntington, NY
5/20	Discover	Dodds & Eden, Inc., Oyster Bay, NY
5/20	ATT	Nobman's Hardware, Oyster Bay, NY
5/21	AMEX	Milleridge Inn, Jericho, NY
5/22	AMEX	IHOP, Norwich, NY
5/23	-----	-----
5/24	AMEX	Pasta's, Hicksville, NY
5/24	ATT	Dr. Colletti's, Syosset, NY
5/24	ATT	Nassau Radiologic, Mineola, NY
5/24	Discover	East Norwich Pharmacy, Oyster Bay, NY
5/25	AMEX	Buckram Stables, Locust Valley, NY
5/25	ATT	Hicks Nurseries, Westbury, NY
5/25	Discover	Sears, Hicksville, NY
5/26	-----	-----
5/27	-----	-----
5/29	AMEX	Ben's Deli, Jericho, NY

5/29	ATT	Garden World, Syosset, NY
5/29	ATT	Lane Bryant, Huntington Sta., NY
5/30	ATT	Martin Viette Nursery, Norwich, NY
5/31	ATT	Garden World, Huntington, NY
6/01	AMEX	Steve's Pier I, Bayville, NY
6/02	ATT	Particular Pet, Huntington, NY
6/03	AMEX	Nina's Restaurant, Huntington, NY
6/03	ATT	Hicksville Pamper, Hicksville, NY
6/04	-----	-----
6/07	AMEX	Empire Diner, Hicksville, NY
6/07	AMEX	Viva Juan, Huntington, NY
6/07	ATT	Syosset Animal Hospital, Syosset, NY
6/07	ATT	Candlewycke Antiques, Cold Spring Harbor, NY
6/08	AMEX	Milleridge Inn, Jericho, NY
6/11	AMEX	Café Baci, Westbury, NY
7/16	AMEX	Trans World Airlines, Norwich, NY
9/30	AMEX	New York Palace Restaurant, NYC
9/30	ATT	Cove Opticians, Glen Cove, NY
9/30	Discover	Saks 5 <sup>th</sup> Avenue, NYC
10/01	-----	-----